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In the

Supreme Court of the United States

[redacted]

October Term, 1956

No. 69

[redacted]

[redacted] et al., Appellants,

v.

[redacted], Appellant

[redacted]

[redacted] A. [redacted], et al., Appellees.

[redacted]

[redacted] on Supreme Court of Virginia

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In The

Supreme Court of the United States

October Term, 1961

No. 357

JOHN SCHROEDER, et al., APPELLANTS,

V.

HOMESTEAD CORPORATION, APPELLANT

Impleaded with

MARGARET A. WILLIAMS, et al., APPELLEES.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

REPLY TO MOTION TO DISMISS OR AFFIRM

While the motion to affirm and dismiss, is a skillful evasion of fundamental facts in this case, it would not be necessary to file a reply brief but for the confusing and misleading contradictory statements, appearing therein and failing to refer to United States surveys or maps, showing the area of appellants and the state location and having misquoted the Federal Court of Nebraska, and Circuit Court of Appeals, makes it necessary to correct erroneous statements to clarify the record.

In this Reply Appellants will assume that the five persons who signed the Motion to Dismiss or Affirm are entitled to represent or act for Appellees, although there is nothing in their Motion to indicate the principal or principals for whom they speak. In this Reply unidentified page references are to the Motion to Dismiss or Affirm.

Because this case involves a geographical area and land locations, understanding the legal issues is difficult without a map of the Iowa area. Accordingly, Appellants have attached as Appendix A to this Reply a map of the area. This is the same map that is contained on page 28 of the Record, and Exh. 22 R.

The Motion to Dismiss or Affirm argues that a state court asked to enforce a judgment of a sister state may examine the jurisdiction which the judgment-rendering court possessed over the property and person, and, if jurisdiction over the person is lacking, refuse to give full faith and credit to the sister state's decree. Undoubtedly this is settled law. But in this case the Nebraska court did not refuse enforcement of the December 30, 1952 Iowa decree because Iowa lacked jurisdiction over the person. The Motion to Dismiss or Affirm states, the Nebraska refusal was based ". . . upon purely factual grounds regarding the action of the Missouri River . . . ." Page 12. Thus, we are told by the Motion that the Iowa decree failed to gain recognition because the Nebraska court found the Missouri River had removed the disputed land beyond the boundaries of Iowa and hence outside the power of her courts. The Nebraska decision was not based upon any holding that the Iowa court failed to

acquire personal jurisdiction over W. W. Freeland and Appellee Williams under Art. IV, Sec. 1 of the U.S. Constitution.

As to Freeland and Appellee Williams, and their privies Bylund and Tyson, Appellees, the Motion contends that the record fails to disclose whether they filed general or special appearances; whether they participated in the Iowa trial; and what evidence they, or anyone else, produced before the Iowa court. Pages 10-11, 24. If any of these matters justify Nebraska's Courts refusal to recognize the decree of a sister state, and Appellants deny that they do, the short answer is that none of these points were raised by the Appellees in the Nebraska court, no findings of fact were made about them, and by Appellees' admission, the Nebraska court did not base its refusal to enforce the Iowa judgment upon them.

Appellants do not believe that the burden of alleging or proving these factual matters constitutionally can be placed upon them by the courts of Nebraska. In *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940) the Supreme Court of the United States, quoting from *Adam* v. *Saenger*, 303 U.S. 59, 62 (1938) stated: "But if the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction *over the cause and the parties* is to be presumed unless disproved by extrinsic evidence, or by the record itself.'" (Emphasis Added).

The following federal issue is one of several squarely presented by this case: Under the full faith and credit clause of the federal constitution, may a Nebraska court refuse to enforce a Harrison County District

Court Iowa judgment determining title to land and running against appellees who were served and appeared in the Iowa action with full opportunity there to raise and litigate the Iowa court's jurisdiction over the land? Appellants view this question as substantial, and the Nebraska court's answer to it, squarely contrary to prior decisions of the Supreme Court of the United States.

Appellees argue that the Nebraska court had jurisdiction over the land involved in this dispute. There is nothing in the record to prove it. They contend that the Nebraska court might have found under the doctrine of accretion that the disputed land was within the boundaries of Nebraska. They further argue that this raises no federal question that if it did, the evidence on the issue of accretion is not before the United States Supreme Court; and that the Nebraska court decided the accretion issue correctly. Appellants are in record which show their title and ownership to Iowa lands and payment of taxes for over 21 years.

Appellees refer to the decision of *Schroeder* v. *Freeland*, 89 F.Supp. 169 in support of their contention that the Nebraska court correctly decided that the land had shifted to Nebraska's side of the border. Pages 19 to 21.

The full answer to Appellees' reliance upon the judgment in the above-cited case is that the judgment was reversed by the Court of Appeals on the ground that the federal district court lacked jurisdiction under the Judiciary Article of the United States Constitution. 188 F.2d 517 (C.A. 8th 1951). Accordingly, the judgment and opinion of the federal district court is with-

out any legal effect in favor of Appellees. On the contrary it favors Appellants' titles in Iowa.

Furthermore, Appellants do *not* contend that the federal question presented by this appeal is whether sufficient evidence existed to support the Nebraska court's holding that the disputed land had "accreted" to Nebraska's jurisdiction. What Appellants do contend is that between the parties to the instant litigation, under the Federal Full Faith and Credit Clause, and the implementing congressional legislation, the jurisdictional fact of whether the land had "accreted" to Nebraska sovereignty was foreclosed by the prior, contrary, Iowa decision. The question is not whether the Nebraska court erred in law or fact in what it did; the question is whether the Nebraska court had power to re-examine an issue previously adjudicated by the Iowa judicial system of a sister state of the Union, and deny said judgment full faith and credit under Sec. 3, of the Iowa-Nebraska Compact 1943.

Neither of the two cases discussed by Appellees on pages 21 and 22 of their Motion (*Chicago Mill and Lumber Company* v. *Tully*, 130 F.2d 268 and *Anderson-Tully Co.* v. *Chicago Mill & Lumber Co.*, 175 F.2d 735) is at all comparable to the instant case. In neither cited case was there a conflicting judgment of a sister state of Iowa which a party contended was entitled to full faith and credit. The constitutional significance of the 1952 Harrison County Iowa judgment in the instant case cannot be handled by ignoring its existence. This Court aptly put the same thought: "The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

In the Motion to Dismiss or Affirm filed by the Appellees on page 8 of said Motion the last paragraph reads as follows:

The Court overruled the demurrers, the various motions for summary judgment; and then held (Record Page 167 Et.Seq.):

> "That when the State of Iowa was admitted to the Union in 1851, the area of land involved in this litigation was east of the Missouri River and was at that time in the State of Iowa, *but that commencing in the year 1958 the Missouri River began slowly and gradually to move its channel to the eastward and by a gradual process of deletion erode all of said area from the State of Iowa* and as said river gradually *receded to the East*, said area of land was built to the west of the channel of said river and was joined to and was accreted to the existing land in the State of Nebraska, and thereby ceased to exist in the State of Iowa, and became a part of the State of Nebraska." (Emphasis is ours)

Appellants Map Exhibit No. 22 in their Bill of Exceptions is the only evidence now before the United States Supreme Court which shows the lands involved in this litigation. The appellees' Motion to Dismiss, as quoted above, is erroneous, inaccurate and contrary to the evidence in the record, adversely effected and is written and incorporated therein for the express purpose of prejudicing the minds of this Court and concealing the true facts as shown by the record. There is no evidence that any lands embraced in the description as shown by Exhibit No. 22 were eroded from the State of Iowa in 1958 and accreted to the State of Nebraska; this statement is false and untrue, without

foundation, contrary to law and the evidence introduced by the appellants and takes their property in violation of Art. 14, Sec. 1 of the U.S. Constitution.

We call to the attention of this Court and ask it to take judicial notice that in the judgment and decree in the District Court of Washington County, Nebraska, dated April 12, 1960, by Jackson B. Chase, District Judge, we quote from paragraph 7 p. 160 of said decree in R.:

> "The court specifically finds that the purported foreign judgment and decree of the District Court of Harrison County, Iowa, dated December 30, 1952, said decree being entered in Case No. 18,376, is void and of no force and effect for the reason that said District Court of Harrison County, Iowa, had no jurisdiction over the land involved in this action, *said land being then and for many years prior to any of the incidents set forth in the pleadings of said Iowa action non-existent in the State of Nebraska* . . ." (emphasis is ours)

The appellees decree on its face shows that the appellants' land was not within the territorial jurisdiction of the District Court of Washington County, Nebraska and is therefore null and void.

Appellees' statement on page 23 of their Motion that a ". . . judgment never becomes res adjudicata unless the court had jurisdiction of the subject matter . . ." denies that subject matter jurisdiction is subject to the principles of res judicata. This is, of course, contrary to decisions of this Court, particularly, *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). That decision clearly held that the issue of subject matter jurisdiction was not open to collateral attack by a person who had opportunity to litigate that issue in a prior judicial proceeding. The *Chicot County*

decision held that a person was not ". . . privileged to remain silent and raise it [subject matter jurisdiction of a court] in a subsequent suit." 308 U.S. at page 378. The privilege denied by this language is exactly the privilege that the Appellees claim in their Motion—the privilege of remaining silent during the Iowa proceeding and of litigating anew in Nebraska the subject matter jurisdiction of the Iowa court, is res adjudicata.

Appellees dispose of the Iowa-Nebraska Boundary Compact of 1943 by urging two points, first, that it does not affect private land titles, and second, that it does affect private land titles, but provides a 5 year period within which the compact rights of private owners must be asserted. Pages 24 to 26. Which of these inconsistent positions is correct presents a substantial federal question. However, Appellants cannot agree with Appellees' position on either point. Section 3 of the Iowa-Nebraska Compact protects Appellants "titles, mortgages and other liens . . ." To construe this language not to apply to private property rights either gives the quoted language no real legal significance, or twists its meaning in a manner which Appellants cannot presently perceive and upon which Appellees have not elaborated in their Motion.

Section 4 of the Iowa-Nebraska Compact, of 1943 which contains the 5 year limitation period, provides that "Taxes . . . may be levied . . . and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized . . . ." The section concludes: ". . . all liens or other rights accrued or accruing as aforesaid . . ." shall be asserted within a 5 year period. Appellees contend that this 5 year lim-

itation applies to the private rights protected by Section 3 of the Compact ("Titles, mortgages, and other liens good in Iowa shall be good in Nebraska . . ."). Appellants paid taxes on lands from 1938 to 1959 as shown on Appendix A. With this construction Appellants cannot agree. Properly construed the limitation period, applicable by the language of section 4 to "liens or other rights . . . as aforesaid," applies only to the rights specified in section 4, and is inapplicable to the private title rights of appellants specified in section 3.

This Reply is not the place to argue this construction issue fully. Appellants respectfully submit that the proper construction of the Iowa-Nebraska Compact presents a substantial federal question of such magnitude and importance that this Court should resolve it and settled this litigation that has before state & federal Courts for past 16 yrs. in a vexatious manner.

Appellees complain in their Motion to Dismiss or Affirm that the following judgments and decrees are not in the Transcript of Record filed in this case: (1) The Iowa decree dated December 5, 1946, (2) the Iowa judgment dated November 25, 1947, and (3) the federal district court of Iowa judgment dated October 6, 1937. Pages 4-5. The Appellees correctly state that the Iowa decree dated December 30, 1952 was "bottomed" upon these three prior judgments and decrees. The three decrees and judgments listed above, all entered prior to December 30, 1952, are not in the record in this case because they form the evidence and the chain of Appellants' title upon which the Iowa decree of December 30, 1952 was based. Appellees are arguing that the Nebraska court should be free to ex-

amine whether the three judgments and decrees listed above support the Iowa decree of December 30, 1952. Appellees would have the Appellants prove to the satisfaction of the Nebraska judicial system the validity of the December 30, 1952, Iowa decree on its merits. In short, Appellees would compel the Appellants to produce their evidence on the merits so the Nebraska judicial system might pass upon the legal rights of the Appellants for a second time which were violated under Art. 14, Sec. 1 of the U.S. Constitution when Nebraska courts took Appellants' land without process of law and equal protection of the law.

Elementary principles underlying the Full Faith and Credit Clause—principles long ago declared by this Court—preclude any serious contention that Appellants must litigate the merits of their claims a second time in Nebraska. Right or wrong, the Iowa decree is binding on Nebraska's courts. See *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940).

The decrees which Appellees claim are missing, are absent from the Record because they are irrelevant to any issue open to the Nebraska courts under the Federal Constitution. The Iowa decree of December 30, 1952, of course, was based upon evidence. This evidence consisted of the three afore-mentioned decrees, as well as other documentary evidence which this Court will find in the papers in this case on file in the Office of the Clerk of the Supreme Court of the United States. See Exhibits 1-1A, 2, 3, 4, 5, 10, 12 and 22. The legal effect of these exhibits, and the three decrees mentioned above, was adjudicated by the Harrison County Iowa decree of December 30, 1952, by a court of competent jurisdiction and the Appellants contend that the

Full Faith and Credit Clause forecloses the Nebraska courts from re-examining that issue for a second time.

And this appeal is brought to your attention in order that you may give full faith and credit to this foreign judgment to which it is entitled under the Iowa-Nebraska Boundary Compact of 1943, and Article IV, Section 1 of the Constitution of the United States, in order that appellants' property rights, and right of possession may be protected in this case and nothing more — if this judgment is to be granted full faith and credit which the Iowa-Nebraska Compact agreement of 1943 is made mandatory. All of which the trial court in Washington County failed and refused to take judicial notice of, and permitted the appellees to collaterally attack the registered judgment and destroy its effectiveness forever — and take appellants' Iowa lands without due process of law — *and deny appellants equal protection of the laws of Iowa and Nebraska,* then the Iowa-Nebraska Boundary Compact of 1943 is meaningless and has no effect.

Counsel for the Appellants respectfully submit that jurisdiction should be noted, or, if the case is not within the class of appealable cases, that then certiorari should be granted.

Respectfully submitted,

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Omaha, Nebraska,
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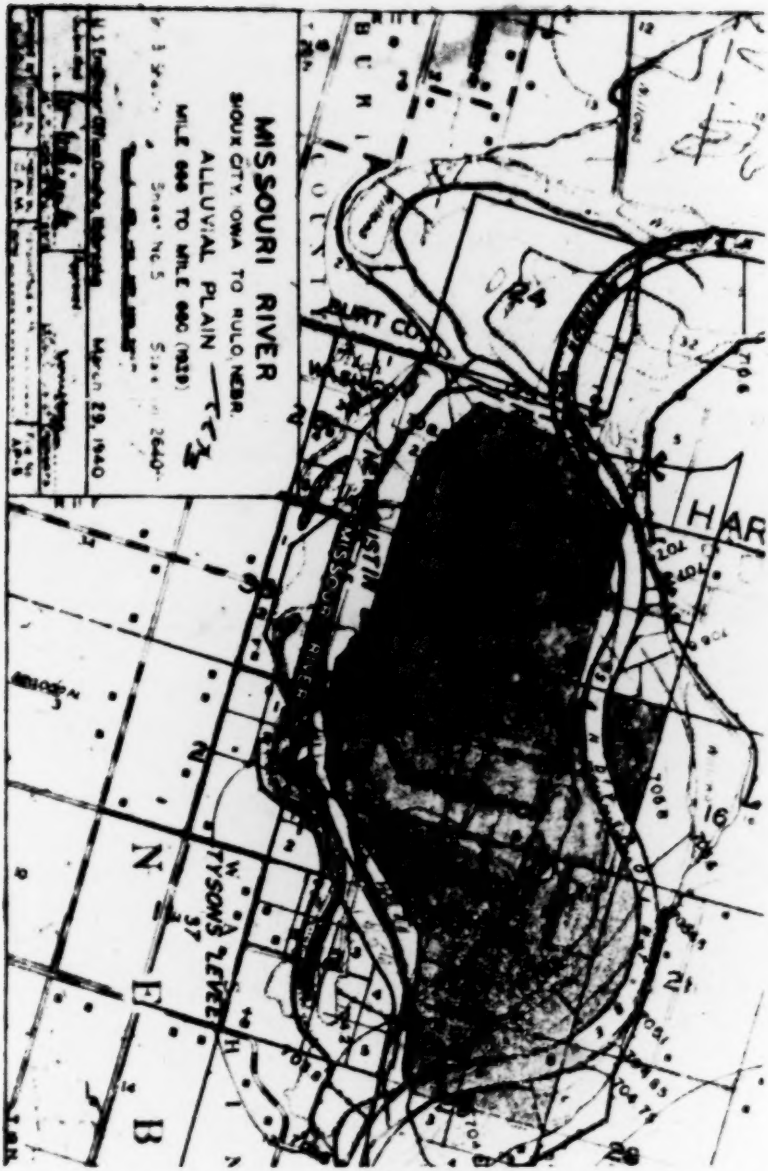
APPENDIX A



This map particularly identifies the area of appellants' lands in Sections 7, 8, 17, 18, 19, 20 and 29 in

Township 79 N. R. 45 West of 5th P. M. Harrison County, Iowa; said lands involved in this litigation were east of the Missouri River at the time the State of Iowa was admitted to the Union (1851); and shows stabilized channel of the Missouri River made by the U. S. Army Engineers' Corps, Omaha, Nebraska, from Peterson's Bend Cutoff to Sand Point Bend known as the stabilized channel of the Missouri River of 1940 and established under the Iowa-Nebraska Boundary Compact of 1943 in Harrison County Iowa.

We ask the Supreme Court to take judicial notice of this photo-engraved map showing alluvial plain sheet No. 5, by the U. S. Army Engineers' Corps, dated March 29, 1940, referring particularly to area, Exhibit No. 22 of Appellant's Bill of Exceptions, R. (Appellants' lands shown on map identified by Hugh Dillon, Nebraska State Surveyor, are geographically located in Harrison County, Iowa, contiguous to Nebraska and not within the territorial jurisdiction of any Nebraska courts).

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